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No. 90-1821

In the Supreme Court of the United States

OCTOBER TERM, 1991

JAMCO (JOHNSON ARCHITECTURAL METAL CO.),
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supports the findings of the National Labor Relations Board that petitioner threatened reprisals against employees if they chose to elect a union and retaliated against employees for their union activities.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is unreported, but the decision is noted at 927 F.2d 614 (Table). The decision and order of the National Labor Relations Board (Pet. App. 2a-10a), adopting, with modifications, the decision and proposed order of the Administrative Law Judge (Pet. App. 11a-52a), are reported at 294 N.L.R.B. No. 80.

JURISDICTION

The judgment of the court of appeals was entered on February 22, 1991. The petition for a writ of certiorari was filed on May 23, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a construction contractor specializing in glass and metalwork, works on construction projects in Georgia, Florida, and other southern states. Pet. App. 13a-14a. In July 1978, the Glaziers' Architectural, Metal, and Glass Workers' Local 1940 ("the Union") began an organizational campaign among petitioner's employees. Employee Johnnie Lambert obtained signed union authorization cards from a number of employees at petitioner's IBM Tower jobsite in Atlanta, Georgia. *Id.* at 14a. After learning of Lambert's union activities from another employee, job superintendent Tony Faulkner questioned Lambert about his union membership and told him that petitioner was "not union" and either "didn't want" a union or was "not going" union. *Id.* at 17a.

Between July 31 and August 25, petitioner hired four new employees—Mitchell Kerr, Roman Modest, Robert Harris and Charles Russell—to work at a jobsite known as Concourse 5 in Atlanta. Pet. App. 34a. During the month of August, all four men engaged in union-related activity while employed at the job site.[1] On approximately September 1, IBM Tower Superintendent Faulkner advised General Superintendent Johnson that he no longer had work for five employees. Petitioner routinely shifts employees among various job sites. Johnson accordingly asked other job superintendents if they could use additional employees at

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[1] Harris, a union member, had been sent to the jobsite by his business agent and was told to be "a role model employee." Kerr, a union member when hired, solicited authorization card signatures from other employees. Modest and Harris testified for the Union at a Board-conducted hearing on the Union's representation petition held on August 21. Harris was also observed posting union literature by Project Superintendent Maynard. On August 27, two days after being hired, Russell signed a union card. Pet. App. 34a-35a.

their job sites. Since no workers were needed on other projects, Johnson decided to lay off five men. *Id.* at 37a-38a. In a previous layoff during the summer of 1986, petitioner had chosen employees to lay off based on a combination of factors, including the employees' skill, experience, and length of service. *Id.* at 36a, 38a; Tr. 189-191, 352-353, 388-389.[2] This time, however, petitioner opted to lay off employees strictly according to seniority, Pet. App. 38a, 41a; Tr. 188-191, 372-373, which resulted in the layoff of employees Modest, Kerr, Harris, and Russell at the Concourse 5 site, and another employee working elsewhere. Pet. App. 34a, 38a. Because there was a substantial amount of work left to be done on the Concourse 5 job, other employees were transferred to Concourse 5 to perform the work of the laid off employees. *Id.* at 36a.

According to employees' testimony, Superintendent Maynard approached Kerr and Harris at the jobsite on September 4 and informed them that they were being laid off because petitioner had "found out that the Union hall sent [them] down there to get a job." Maynard stated that the matter was "out of his hands." Harris objected, but Maynard reiterated that it was not within his control. Maynard told Kerr that "he would try to get them back to work as soon as he could, but it would probably be after 'this union business' was over." Pet. App. 35a-36a.

About one week before the October 14 representation election, David Edell, the project manager at petitioner's jobsite in Tampa, Florida, spoke to an assembly of the Tampa employees. Tampa jobsite employees Guthrie and Fletcher claimed that Edell made threats that petitioner's operation would be closed if the Union won the election. Pet. App. 23a-24a, 27a, 29a. The Union lost the ensuing election and filed objections to petitioner's preelection con-

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[2] "Tr." refers to the transcript of the hearing before the ALJ.

duct and unfair labor practice charges with the Board. *Id.* at 12a.

2. In a decision that was affirmed by the Board, as modified (Pet. App. 2a-3a), the administrative law judge (ALJ) found that petitioner violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by threatening to close or move if the employees selected the Union to represent them. Pet. App. 29a. The ALJ further found that petitioner violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by laying off employees Roman Modest, Mitchell Kerr, Charles Russell, and Robert Harris because of their union activities. Although the ALJ found that the employer was within its rights in implementing a layoff, he determined that petitioner's decision to lay off workers according to strict seniority was motivated by anti-union animus.[3] Pet. App. 38a-42a. The ALJ noted that petitioner "had a substantial amount of work left to perform on the Concourse 5 job" and that petitioner conceded that "it had not followed strict seniority in past layoffs." *Id.* at 36a. The ALJ also relied on the testimony of employees Kerr and Harris that Maynard attributed the employees' layoffs to their involvement with the union. *Id.* at 39a-40a.

In finding that Tampa project manager Edell made threats that petitioner would shut down or move if the union campaign succeeded, the ALJ expressly credited the testimony of employee James Fletcher. Pet. App. 27a. The ALJ noted

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[3] The Board also affirmed the ALJ's finding, which petitioner does not challenge here, that petitioner violated Section 8(a)(1) by coercively interrogating employee Lambert regarding his union activities. Pet. App. 18a. In addition, the Board determined that the representation election should be set aside because it was tainted by petitioner's unlawful conduct. *Id.* at 6a, 42a-45a. The Board's direction of a second election (*id.* at 7a-8a) was not before the court of appeals for review, and petitioner does not challenge it before this Court.

that Fletcher was still employed by petitioner and was putting his job at risk in testifying against petitioner. *Id.* at 26a. The ALJ also found that Fletcher's demeanor reflected an "attempt[] to testify honestly and accurately." *Ibid.* The ALJ added that Fletcher's "believable testimony" was "enhanced by Edell's admitted references [during the talk to Tampa employees] to the closing of PPG [Pittsburgh Plate Glass], another union contractor." *Id.* at 27a. The ALJ also relied on the absence of "specific denials by [petitioner's] witnesses" concerning Fletcher's testimony. *Ibid.*[4]

3. The court of appeals enforced the Board's decision in an unpublished *per curiam* decision. Explaining that "[q]uestions of credibility are peculiarly within the purview of the fact finder," Pet. App. 1a, the court found that the Board's decision was supported by substantial evidence in the record.

ARGUMENT

1. Petitioner asserts (Pet. 9-10, 13-14) that the Board has attempted to "sustain [a] holding * * * not warranted by law"—that petitioner was not entitled to lay off employees by seniority—by purporting to rest its decision on "unsupported credibility choices." There is no merit to that contention. The issue here is not whether petitioner, in the absence of anti-union considerations, may lay off employees based on seniority, but whether anti-union considerations in fact motivated petitioner's decision. As peti-

[4] In adopting the ALJ's findings on this point, the Board found it "unnecessary to rely on the judge's statement[] that there were no specific denials by [petitioner's] witnesses of employee Fletcher's testimony" concerning Edell's remarks. Rather, the Board found sufficient to support the decision the ALJ's other observations concerning Fletcher's credibility and the corroboration provided by Edell's admitted references to plant closings at PPG. Pet. App. 3a n.2.

tioner acknowledges, an employer's selection of employees for layoff based on seniority is impermissible where use of seniority is "a change in policy evidently motivated by anti-union animus." Pet. 12. Here, the Board found that, in choosing to follow strict seniority to effect the layoffs of Modest, Kerr, Russell and Harris, petitioner made a change in policy that was motivated by hostility to the Union. The Board's fact-bound determination raises no issue warranting further review. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).[5]

2. Petitioner's challenge (Pet. 14-17) to the Board's finding that Tampa project manager Edell made threats that petitioner would shut down if the Union was elected also presents nothing more than an evidentiary issue. Petitioner contends (Pet. 15) that the Board improperly upheld the ALJ's resolution of this issue because the ALJ erroneously found (Pet. App. 27a) that no employer witness specifically denied the remarks Fletcher attributed to Edell. As we have already noted, however, see p. 5 note 4, *supra*, the Board did not rely on this aspect of the ALJ's decision (*id.* at 2a-3a n.2). The Board affirmed the decision by relying exclusively on other evidence supporting the ALJ's conclusions: the ALJ's findings concerning Fletcher's demeanor, the fact that Fletcher's statement was against self-interest, and Edell's admitted reference to the closing of a unionized

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[5] Petitioner's assertion (Pet. 11-12) that its use of seniority was not a change in policy simply takes issue with the ALJ's contrary finding based on petitioner's own admissions. Pet. App. 36a, 41a. Petitioner's objection (Pet. 13) to the ALJ's reliance on his erroneous finding that petitioner's witnesses failed to deny "conciliatory remarks allegedly made by [petitioner's] supervisors while distributing the layoff notices" ignores that the Board expressly discounted that reliance in upholding the conclusion that the employer's layoff decision was motivated by anti-union considerations. See Pet. App. 2a-3a n.2.

competitor. *Id.* at 26a-27a; Tr. 252, 256-259.[6] These findings provide ample record support for the Board's factual determination that Edell made improper threats to petitioner's employees.[7]

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[6] The record fails to support petitioner's contention (Pet. 15-16) that Fletcher contradicted his own testimony. In the excerpt set out by petitioner (Pet. App. 61a), Fletcher, on cross-examination, answered "yes" to an inquiry as to whether "the closing time that [he] referred to was in conjunction with PPG's situation." On direct, however, Fletcher made clear that Edell discussed the closing of PPG in the context of petitioner's threat to close. See Tr. 85-86, 68-69.

[7] The cases cited by petitioner (Pet. 16-17) are not to the contrary. In *Ona Corp.* v. *NLRB*, 729 F.2d 713, 721-722 (11th Cir. 1984), the court rejected findings that were based entirely on the testimony of a witness that the ALJ himself found had made numerous "misrepresentations," possessed an "extremely unfavorable demeanor," and was hostile and untruthful. In *Custom Recovery, Division of Keystone Resources* v. *NLRB*, 597 F.2d 1041 (5th Cir. 1979), the ALJ, in deciding to credit one witness over another, relied on a nonexistent contradiction in the testimony of the discounted witness, and disregarded his own determination that the witness he believed was unreliable. In *NLRB* v. *Florida Citrus Canners Cooperative*, 311 F.2d 541, 543-544 (5th Cir. 1963), the court reaffirmed its earlier decision (288 F.2d 630, 636-638) that the ALJ's credibility resolutions were based on an improper and unwarranted assumption concerning the loyalties of an employee that had "left the union and went with the management." 311 F.2d at 543.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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